that the Federal Court was fully entitled to accept the principles of assessment laid down by the House of Lords in *Lim Poh Choo's* case. Their Lordships agree with the Federal Court in their view that the assessment of damage under separate heads is necessary in a case such as the present in order to achieve a fair and adequate compensation. Their Lordships do not doubt that this has been achieved by the Federal Court. Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co.; Charles Russell & Co.*

OOI BOON LEONG & ORS. v. CITIBANK N.A.

[P.C. (Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Brightman & Lord Templeman) January 23 to 25 & February 15, 1984]

[Privy Council Appeal No. 42 of 1981]

Contract – Guarantee – Whether parties can contract out of provisions of Contracts Act which define circumstances in which a surety is discharged from his obligations to the creditor – Whether omissions on part of the creditor discharged guarantors from their liabilities – Contracts Act, 1950, ss. 1(2), 2, 86, 92 & 94.

Practice & Procedure – Action on contract of guarantee – Whether action suitable for summary disposal under Order 14 – R.S.C. 1957, O. 14.

In this case the respondent bank had sued the appellants on a contract of guarantee for banking accommodation given to a company. The appellants were the directors of the company and in the contract of guarantee they had agreed to waive their rights in respect of any variation or alteration of the contract between the respondent bank and the company. The advances were not repaid and the respondent bank sued the appellants. The respondent bank applied for summary judgment under Order 14 of the Rules of the Supreme Court. The Assistant Registrar made an order in terms but this order was reversed in the High Court. The appellants had contended that their liabilities under the guarantee were conditional on the respondent bank securing certain acts on the part of the company, the directors and the shareholders. Such acts were not stated in the guarantee but were stated in a letter which set out the terms and conditions of the cases. The appellants relied on the fact that the respondent bank had not obtained (a) a valid debenture on the company's assets containing a provision to enable receivers to be appointed in the event of default; (b) a letter of undertaking from the shareholders who held 40% of the issued share capital not to divest their shareholdings without the bank's consent The Federal Court allowed the appeal of the respondent bank against the order of the High Court – See [1981] 1 M.L.J. 282. The appellants appealed.

The appellants conceded that in the absence of the Contracts Act, 1950, Clauses 7(5), 8 and 16 of the guarantee would prevent the appellants being discharged from the liability by the omissions of which they complain. Two questions therefore arose. First whether those clauses of the guarantee were valid or whether they were void because parties could not contract out of the sections of the Contracts Act, sections 86, 92 and 94. Secondly if parties cannot contract out, whether such omissions on the part of the respondent bank were matters which discharged the appellants from their liabilities upon the true construction of the sections of the Contracts Act referred to.

Held, (1) if freedom to contract is to be curtailed in relation to a particular subject matter, the prohibition should be expressed in the statute and not left by the legislature to be picked out as an implication based upon sections dealing with different subject matters. When the Contracts Act intends to render an agreement void it says so in express terms as in sections 25 to 31;

(2) the clauses in the guarantee are therefore valid and it becomes unnecessary to decide whether the appellants would have been discharged under all or any of the sections of the Contracts Act relied on by the appellants assuming that the clauses of the guarantee relied upon by the respondent bank are void. It is doubtful however whether it can properly be said that the omission from the debenture of a power to sell out of court was a variance of the agreement by the company to grant a fixed and floating charge within the meaning of section 86 of the Contracts Act relied on by the appellants, and whether in the terms of the Act the appellants would have been discharged by the omission of the respondent bank to obtain the undertakings called for by the Letters of Agreement;

(3) the action was not suitable for summary disposal under Order 14 since the defence did raise matters for serious arguments. The issues could more appropriately have been decided without the expense of a full trial with witnesses, by way of the hearing of a preliminary issue. However it would not be appropriate for the appellants to be given leave to defend, since a decision has been reached on the merits of the defence and nothing remains to be tried.

Cases referred to:

(1) *Sheikh Mahamad Ravuther* v. *British India Steam Navigation Company Limited* (1908) 32 I.L.R. Madras 95.

(2) *K.R. Chitguppi & Co.* v. *Vinayak Kashinath Khadilkar* A.I.R. 1921 Bom. 164.

(3) *Lakhaji Dollaji & Co* v. *Boorugu* A.I.R. 1939 Bom. 101.

(4) *Irrawaddy Flotilla Company* v. *Bugwandass* (1890) 18 I.A. 121

PRIVY COUNCIL APPEAL FROM MALAYSIA.

T.L.G. Cullen Q.C. (*Miss Choi Yok Hong* with him) for the appellants.

Robert Alexander Q.C. (*Cecil Abraham* with him) for the respondents.

Cur. Adv. Vult.

Lord Brightman (delivering the judgment of the Board): The principal question arising on this appeal is whether the terms of the Contracts Act 1950 of Malaysia are such that parties to a guarantee cannot contract out of certain sections of the Act which define circumstances in which a surety is discharged from his obligations to the creditor. Subsidiary questions which arise are whether this issue is one which was proper to be decided by the High Court under the summary jurisdiction conferred by Order 14 of the Rules of the Supreme Court; if not, whether the matter should now be dealt with, not on a final basis, but on the interlocutory basis of restoring the order of the High Court which gave the appellants unconditional leave to defend.

The appellants are three directors of a company called Leisure Industries Sdn. Bhd. They hold 60% of the issued capital. There is no evidence whether they were the only directors. In March 1975 the appellants approached the Kuala Lumpur branch of the respondent, Citibank N.A., for the grant of credit facilities to the company. In the result the Bank wrote a letter to the company dated March 24, 1975 confirming that it was prepared to make funds available "... substantially according to the terms and conditions outlined below ...". The letter then set out the amount and purpose of the loan, rate of interest, commitment fee, repayment dates and other details. The final repayment instalment was to be made on July 1, 1977. Against the side note "Security" there appeared the following: –

"(a) A registered first fixed and floating charge stamped for M$600,000 over all fixed and current assets, both present and future.

(b) Joint and Several Guarantee for M$600,000 signed by [the appellants]."

Against the side note "Conditions of Disbursement" there appeared the following: –

"Conditional upon the following terms: –

(a) Satisfactory completion of securities and documentation;

(b) Letter of Undertaking signed by all shareholders not to divest their respective shareholdings without the Bank's prior written consent and to inject additional capital into the company in the event of cash shortfall as long as the term loan is outstanding."

The penultimate paragraph of the letter was as follows: –

"This commitment is conditional upon the preparation, execution and delivery of legal documentation in form and substance satisfactory to us and to our solicitors incorporating substantially the terms set forth above."

The company, by the signature of two of its directors, signified its acceptance of the terms of the letter. Their Lordships will refer to this letter as "the Letter of Agreement". On the same day the appellants signed a guarantee in favour of the Bank. In consideration of the Bank giving credit to the company the appellants jointly and severally guaranteed payment on demand of all money owing by the company to the Bank together with interest, provided that the total sum recoverable should be limited to M$600,000 with interest. The guarantee contained terms commonly found in a bank guarantee, including the following: –

"7. The Bank may at all times without prejudice to this guarantee and without discharging or in any way affecting our liability hereunder and without notice to any of us ... (5) deal with exchange release modify or abstain from perfecting or enforcing any securities or any other guarantees or rights which the Bank may now or hereafter have from or against the customer or any other person.

8. The liability of any of us hereunder shall not be affected by any failure by the Bank to take any security...

16. Not one of us shall be discharged or released from this guarantee by any arrangement made after this guarantee or any dealing between the customer and the Bank without our knowledge or consent or by any variation or alteration without our knowledge or consent in the agreement between the customer and the Bank for the making of advances or otherwise giving credit or affording banking facilities to the customer by the Bank."

On May 6, 1975 the company granted a debenture in favour of the Bank. The debenture conferred on the Bank power to appoint a receiver and manager in case of default, but it did not empower the receiver and manager to realise the security. The Bank did not obtain from the shareholders, other than the appellants, a letter of undertaking "to inject additional capital into the company" as required by the Letter of Agreement.

On August 26, 1977, by which date the whole of the loan should have been repaid, the Bank formally demanded the outstanding principal and interest from the company. The company defaulted. In September the Bank called upon the appel-

lants to make good the company's default pursuant to the guarantee. The appellants denied liability. In December the Bank issued a writ against the appellants. The outstanding loan and interest calculated to 31st October amounted to M$331,731.32. In January 1978 the Bank issued a summons for summary judgment under Order 14 of the Supreme Court Rules on the footing that there was no defence to the action. The Bank also appointed receivers and managers under the power contained in the debenture, who applied in March for an order for sale of the property thereby charged. The appellants contested the Order 14 application and sought unconditional leave to defend on the ground that they were discharged from their guarantee because the Bank had failed to obtain a debenture which conferred on a receiver a power of sale thus necessitating an application to the court, and had also failed to secure from the other shareholders an undertaking to inject further capital into the company in the event of a cash shortfall. This argument was maintained despite the presence of clauses 7, 8 and 16 in the guarantee, whereby the appellants had agreed that they should not be discharged from liability by reason of the Bank's dealings with the company. It was said by the appellants that such clauses were void by virtue of certain sections of the Contracts Act 1950 to which their Lordships will now refer.

The Contracts Act 1950 is described in the long title simply as "An Act relating to contracts". It is not expressed to be a consolidating or amending statute. It is, however, clearly intended to codify the law of contract as regards those aspects of contract law which are grouped under the Act's nine definitive headings. It is modelled on the Indian Contracts Act 1872, many of the sections being in identical language.

Part I of the Act has the cross-heading "Preliminary". This is the only part of the Act that has a cross-heading which is not definitive of some aspect of the law of contract. Section 1 reads as follows:–

"1. (1) This Act may be cited as the Contracts Act, 1950.

(2) Nothing herein contained shall affect any written law or any usage or custom of trade, or any incident of any contract, not inconsistent with this Act."

Section 2, which is the only other section in Part I, is an interpretation section which explains what is meant by certain words in common use in the field of contract. The only two explanations to which it is relevant to refer are:–

"(e) every promise and every set of promises, forming the consideration for each other, is an agreement;...

(g) an agreement not enforceable by law is said to be void."

Part VIII is headed "Of Indemnity and Guarantee". It runs from section 77 to section 100. The appellants rely on three sections:–

"86. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

"92. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is hereby impaired, the surety is discharged.

"94. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security."

The argument on behalf of the appellants is that the Bank's omission to obtain a debenture in the usual form, that is to say, containing a power of sale, and the Bank's omission to secure from the other shareholders the undertaking for which the Letter of Agreement provided, were variances made without the appellants' specific consent in the terms of the contracts between the company and the Bank, thereby discharging the appellants under section 86; that such omissions were contrary to the duty owed by the Bank to the appellants, whereby the eventual remedy of the appellants against the company might be impaired, thereby discharging the appellants under section 92; that the omission to obtain the undertakings deprived the appellants of the benefit of a security which the Bank had against the company thereby discharging the sureties under section 94; that clauses 7(5), 8 and 16 of the guarantee were inconsistent with those sections and therefore void because the parties were not entitled to contract out of sections 86, 92 and 94.

The Order 14 summons came before the Senior Assistant Registrar in May 1978. He rejected the appellants' arguments and decided that there was no *bona fide* triable issue which entitled the appellants to have the summons dismissed. He entered judgment for the Bank accordingly. The appellants appealed to the judge, who reversed the decision of the Assistant Registrar and gave the appellants unconditional leave to defend the action. The Bank

appealed. The matter came before the Federal Court in July 1980, who allowed the appeal and gave the Bank leave to sign final judgment against the appellants.

The appellants' counsel conceded, rightly, that in the absence of the Contracts Act 1950, clauses 7(5), 8 and 16 of the guarantee would prevent the appellants being discharged from liability by the omissions of which they complain. Two questions therefore arise, first whether those clauses of the guarantee are valid, or whether they are void because parties cannot contract out of the sections of the Act upon which the appellants rely; secondly, if parties cannot contract out, whether such omissions on the part of the Bank were matters which discharged the appellants from their liabilities upon the true construction of any of the sections referred to. Their Lordships will consider the contracting out question first. If that is answered in favour of the Bank, the second question will not arise.

Counsel for the appellants put his argument in two ways. He relied first upon section 1(2) of the Act, stating that "nothing herein contained shall affect ... any incident of any contract, not inconsistent with this Act". A term of a contract is an incident of that contract. So nothing in the Act is to affect any term of a contract which is not inconsistent with the Act. It follows, *per contra,* that the Act is to affect a term of a contract which is inconsistent with the Act. Therefore the Act renders void any term of a contract inconsistent with the Act; clauses 7(5), 8 and 16 of the guarantee are inconsistent with sections 86, 92 and 94 of the Act; particularly, such clauses are inconsistent with section 86.

The second way in which counsel put his argument was based on a comparison between the form of sections 86, 92 and 94 of the Act and the form of certain other sections which expressly envisage the parties otherwise contracting. For example, section 38(2) provides that a promise is binding upon the estate of the promisor, but the parties may otherwise contract:—

"Promises bind the representatives of the promisors in case of the death of the promisors before performance, unless a contrary intention appears from the contract."

Section 44(1) provides that a promise may require any one of joint promisors to perform the whole of the promise "... in the absence of express agreement to the contrary ...". There are 16 other like examples in the Act of sections which incorporate such words as these, although the precise formulation differs from time to time. The implication, says counsel, is that where the Act intends contracting out to be permissible, it says so. Sections 86, 92 and 94 do not expressly provide for contracting out. Therefore, by implication, contracting out is unlawful and clauses 7(5), 8 and 16 of the guarantee are void.

It is correct to say that judicial views have been expressed on the Indian Contracts Act 1872 which support the submission of counsel; see *Sheik Mahamad Ravuther* v. *British India Steam Navigation Company Limited*[1], *K.R. Chitguppi & Co.* v. *Vinayak Kashinath Khadilkar*[2]. But such pronouncements do not stand unchallenged; see *Lakhaji Dollaji & Co.* v. *Boorugu*[3] to the opposite effect.

Their Lordships reject the argument based upon section 1(2). An incident of a contract is to be distinguished from a term of the contract agreed by the parties. By an "incident" of a contract is meant a legal consequence of the contract which flows from the existence of the contract although the parties have not in terms expressly provided for it and may not have addressed their minds to it. For example, if X for good consideration promises to pay £100 to Y at a future date, it is an incident of that contract that, if X dies before the date for payment, his personal representatives are liable in his place to the extent of the available assets of his estate though the contract does not so provide. Or if X employs Y to be his agent in money matters, it is an incident of the contract that Y must account to X for his dealings with such money though the contract does not so state. But all such incidents of a contract, the legal consequences which flow from the contract at common law, can be overridden by the agreed terms of the contract unless a statute or the common law otherwise provides. In the first example, the contract may provide that X's estate is not to be liable if X dies before the date of payment. In the second example, the contract may provide that X is not entitled to require Y to account for dealings which took place more than two years ago.

All that section 1(2) of the Contracts Act is saying is that the legal consequences of a contract which ensue at common law are to continue to apply unless some different legal consequences are spelt out by the Act. The sub-section does not say that the contracting parties are unable by

agreement to vary the legal consequences spelt out by the Act. Section 1(2) has no effect on the freedom of contracting parties to decide upon what terms they desire to contract. It would indeed be surprising if so devastating an inroad into the common law right of freedom of contract were introduced by the legislature in a section which is primarily devoted to expressing the short title to the Act and which moreover appears in a part of the Act which is merely headed "Preliminary". In an early case before the Board concerning the Indian Contracts Act 1872, the expression "incident of the contract" was used precisely in the sense which their Lordships have indicated. See *Irrawaddy Flotilla Company* v. *Bugwandass*[4].

The argument founded on a comparison between (i) sections 86, 92 and 94 and (ii) certain other sections of the Act which are expressed to be "subject to a contrary intention" or the like also fails. Random recognition in certain sections of the Act of the fundamental principle that contracting parties are at liberty to express their intentions in their contracts as they please is quite insufficient to support the contrary proposition that the absence of such recognition in another section implies the absence of freedom to contract. If freedom to contract is to be curtailed in relation to a particular subject matter, their Lordships would expect the prohibition to be expressed in the statute, and not left by the legislature to be picked up by the reader as an implication based upon sections dealing with different subject matters. Furthermore, it may be noticed that when the Contracts Act intends to render an agreement void, it says so in express terms; see sections 25 to 31 under the cross-heading "Void Agreements", read with the definitions in section 2(e) and (g).

A few illustrations are sufficient to demonstrate the improbability of the appellants' submission. Section 74 provides that:–

"When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby..."

On the appellants' argument, if a person enters into a contract of services on the express terms that his liability for loss or damage shall be limited to a certain sum (against which perhaps he has insured), that agreed limitation of liability which is common enough in some commercial contexts would be void.

Section 91 provides that:–

"Where there are co-sureties, a release by the creditor of one of them does not discharge the others ..."

If the appellants are correct, an express agreement by a creditor that his release of one co-surety shall release the others from their liability would for some inscrutable reason be void.

Section 104 provides that:–

"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

The owner of a car asks his friend if he can leave it in his friend's drive while both are away on holiday; the bailee agrees, but at the sole risk of the bailor. The appellants' proposition would invalidate that agreement.

A consideration of the terms of the Act, and of the bizarre consequences of the appellants' interpretation, leads inevitably to the conclusion that that interpretation is incorrect.

In the result, it becomes unnecessary to decide whether the appellants would have been discharged under all or any of the sections of the Act relied upon by them, assuming that the clauses of the Guarantee relied upon by the Bank are void. Their Lordships do, however, feel considerable doubt whether it can properly be said that the omission from the debenture of a power to sell out of court was a "variance" of the agreement by the company to grant a fixed and floating charge within the meaning of section 86, which was the section upon which the appellants principally relied; and whether, in the terms of the Act, the appellants would have been discharged by the omission of the Bank to obtain the undertakings called for by the Letter of Agreement.

Although it is clear to their Lordships that the appellants have no defence to the Bank's claim, they feel bound to observe that the action was not in their opinion suitable for summary disposal under Order 14, since the defence did raise matters for serious argument. The issues could more appropriately have been decided, without the expense of a full trial with witnesses, by way of the hearing of a preliminary issue if, as their Lordships assume, there is a provision for such an issue to be tried, as in the rules of the Supreme Court applicable to the English High Court. Nevertheless it would not be appropriate for the appellants now to be given

leave to defend the action, because their Lordships have reached a decision on the merits of the defence and nothing remains to be tried.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Douglas Goldberg & Co.; Coward Chance.*

SINGAPORE REPORTS

"BRUNEI 602", OWNERS OF CARGO ABOARD M.V. v. M.V. "HAI HIN 28", OWNERS OF, & ANOR.

[C.A. (Wee Chong Jin C.J., Kulasekaram & Rajah JJ.) February 17, 1984]
[Singapore – Civil Appeal No. 42 of 1983]

Shipping Law – Action in rem – Cargo lost in sea – Claim against owners of tug and owners of barge – Both tug and barge owned by same company – Arrest of tug – Whether plaintiffs may arrest sister ship – Plaintiffs not allowed to circumvent "single arrest rule"

Jurisdiction – Action in rem – Arrest of ship – Jurisdiction of Court is invoked when writ served on one of named ships and warrant of arrest was executed – Plaintiff could not go against other named sister ships – High Court Admiralty Jurisdiction Act (Cap. 6), ss. 3(1) & 4(4)

Practice & Procedure – Writ in rem – Arrest of ship – "Single arrest rule" applies.

Under a bill of lading dated May 10, 1981, the plaintiffs shipped 390 pieces of coal tar enamel coated pipes on board the ship "Brunei 602" towed by the tug "Hai Hin 28" at the Port of Singapore for carriage and delivery in Indonesia. The plaintiffs were the owners of the said cargo and both the dumb barge and the tug were at all material times owned by Seng Leong Seong Shipping Enterprises (Pte.) Ltd. of Singapore. On May 29, 1981 the said cargo fell into the sea off the coast of Kalimantan and were totally lost. The plaintiffs subsequently issued a writ against the first defendant as the owners of the tug "Hai Hin 28" and the second defendants as the owners of the barge "Brunei 602".

The tug was arrested on February 3, 1983. The first and second defendants entered conditional appearance to the writ on February 11, 1983. On February 18, 1983 they filed an application for an order that the proceedings against the second defendants be set aside. The learned Deputy Registrar allowed the application. The plaintiffs' appeal against the said order was dismissed by Abdul Wahab Ghows J. The plaintiffs appealed against the decision of Abdul Wahab Ghows J.

Held, dismissing the plaintiffs' appeal: (1) in the present case the action pursued against the owners of the tug and the barge is one *in rem* and the vital question herein is therefore one of determining jurisdiction under the High Court (Admiralty Jurisdiction) Act and not of determining liability on a contract of affreightment in the construing of which the object must be to arrive at the real intention of the parties to the contract;

(2) in the present case it is clearly an abuse of the process of the court to allow the plaintiffs to circumvent the single arrest rule under section 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap. 6) by naming a sister ship as different defendants in the same writ, so as to be in a position to arrest both the offending and sister ship;